RECENT DECISIONS.

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APPEAL AND ERROR—PAYMENT OF FINE—EFFECT ON RIGHT TO APPEAL.—The accused was convicted of a misdemeanor. After payment of the fine, he sought to appeal. *Held,* the payment did not constitute a waiver of the right to appeal. *Johnson* v. *State* (Ala. 1911) 55 So. 226.

In civil causes one in whose favor a judgment is rendered, is estopped from prosecuting an appeal by accepting satisfaction thereof, *Ruckman* v. *Alwood* (1867) 44 Ill. 183; *Caill* v. *Oakley* (1884) 97 N. Y. 633, unless he repays or tenders the money recovered. *Murphy's Heirs* v. *Murphy's Adm'r* (1871) 45 Ala. 123. But a judgment debtor does not waive his right to appeal by paying the amount thereof, whether before, *Hayes* v. *Nourse* (1887) 107 N. Y. 577, or after execution has issued, *Richeson* v. *Ryan* (1852) 14 Ill. 74; *Grim* v. *Semple* (1874) 39 Ia. 570, and after reversal he can compel the appellee to make restitution, as the payment is regarded as involuntary. Keener, Quasi-Contracts, 417; *Clark* v. *Penney* (N. Y. 1826) 6 Cow. 297. In criminal actions, however, it has been held that as payment extinguishes the judgment, leaving nothing to appeal from, and as the appellant can not recover the money so paid, and hence could derive no benefit from reversal, the courts will not hear the appeal, since they will not decide a purely speculative question. *State* v. *Westfall* (1873) 37 Ia. 575; *Batesburg* v. *Mitchell* (1900) 58 S. C. 564; *State* v. *Conkling* (1894) 54 Kan. 108. The only difference between appeals in civil and criminal actions after the judgment is paid would therefore seem to be that in the latter, the amount of the fine may not be recovered by the appellant if the judgment is reversed. *Bigby* v. *U. S.* (1902) 188 U. S. 400. The right to appeal, however, cannot be based on this consideration, and this view overlooks the fact that the law presumes that an erroneous judgment is injurious *per se* and that the accused will be damnified by its continuance against him unreversed. *Barthelemy* v. *People* (N. Y. 1842) 2 Hill 248; *Page* v. *People ex rel.* (1881) 99 Ill. 418. It is therefore by no means a speculative question, as the court in the principal case properly held.

BANKRUPTCY—DISCHARGE OF BANKRUPT—EFFECT ON SURETY.—The plaintiff dissolved an attachment on the defendant's property upon receiving a bond with sureties, conditioned upon final judgment. More than four months later the defendant received his discharge under the Bankruptcy Act, which provides that the liability of a surety shall not be altered thereby. Act of 1898, c. 541 § 16 (30 Stat. at L. 550). *Held,* a special judgment with a perpetual stay of execution should be given to render the sureties liable. *Butterick Pub. Co.* v. *E. F. Bowen Co.* (R. I. 1911) 80 Atl. 277.

Although generally a discharge in bankruptcy prevents any judgment against the bankrupt, *Odell* v. *Wootten* (1868) 38 Ga. 224; *Fisse* v. *Einstein* (1878) 5 Mo. App. 78, the Bankruptcy Acts are construed as not prohibiting the enforcement of an attachment lien secured before the four months period. *Peck* v. *Jenness* (1849) 7 How. 612;

Daggett v. *Cook* (1870) 37 Conn. 341. It seems equally desirable to enforce securities substituted for the attachment lien. *Zollar* v. *Janvrin* (1869) 49 N. H. 114. Accordingly, as the discharge does not destroy the debt, but merely bars the creditor's remedies against the bankrupt's person or property, *Stern* v. *Smith & Co.* (1907) 225 Ill. 430; *Kraus* v. *Torry* (1906) 146 Ala. 548, there is no valid reason why the obligation should not be recognized by a special judgment, if a perpetual stay of execution against the bankrupt is also issued to effectuate his statutory exemption. Such procedure, while protecting the insolvent, would effect a performance of the condition upon which depends the liability of the sureties, who have expressly taken the risk of their principal's insolvency. It therefore accords alike with the spirit of the Bankruptcy Acts and the intention of the parties. *Kendrick & Roberts* v. *Warren Bros.* (1909) 110 Md. 47; *In re Marshall Paper Co.* (1900) 102 Fed. 872. By adopting this view, the court in the principal case avoided a troublesome dilemma, since otherwise it must have denied the creditor any rights under the bond, thus subjecting him to a hardship, or else have enforced it by resorting to a somewhat strained interpretation of its terms, treating as a condition subsequent that which the parties intended as a condition precedent. *Fisse* v. *Einstein supra; Knapp* v. *Anderson* (N. Y. 1876) 7 Hun 295.

CARRIERS—COMMON AND PRIVATE CARRIERS—STATUS OF A CHARTERED SHIP.—The libelant, who had chartered a vessel to carry a load of wood, brought suit against the ship for loss of the cargo. *Held*, the ship was not a common carrier. *The Royal Sceptre* (D. C. S. D. N. Y. 1911) 187 Fed. 224.

As distinguished from a private carrier who has never professed to serve all, or who merely carries goods occasionally as an incidental occupation, *Fish* v. *Clark* (1872) 49 N. Y. 122; *Allen* v. *Sackrider* (1867) 37 N. Y. 341, a common carrier is one who holds himself out as willing to carry for hire for all persons indifferently. Story, Bailments, (9th ed.) § 495. Thus while the general carriage of goods by sea is undoubtedly a public calling, *Gage* v. *Tirrell* (Mass. 1864) 9 Allen 299; *Elliott* v. *Rossell* (N. Y. 1813) 10 Johns. 1, it must be determined in each case that the particular ship owner has held himself out as ready to serve all, either by declarations, *Ingate* v. *Christie* (1850) 3 Car. & K. 61, by the previous conduct of the business, *Howth* v. *Franklin* (1885) 20 Tex. 798, or, as in the case of a railroad, by the common usage in like business. 1 Hutchinson, Carriers, (3rd ed.) § 76. It is clear, therefore, that the mere chartering of a ship does not constitute an undertaking to serve the public in a like manner. *Lamb* v. *Parkman* (1857) 1 Spr. Cir. Ct. Rep. 243; *Sumner* v. *Caswell* (1884) 20 Fed. 249; Story, Bailments, (9th ed.) § 501; Angell, Carriers, (5th ed.) § 89. Although there is authority for the view, it would seem erroneous to hold as a conclusion of law that where the entire ship is chartered, the owner is not a common carrier, for in every case the question of common carriage is a question of fact. *Howth* v. *Franklin supra.* For example, if the ship which is chartered had always been employed in public service, it is rational to regard the transaction as merely a shipment of sufficient goods to fill the ship and in this case, of course, the character of the common carrier is not changed, since he cannot by contract convert himself into a private carrier, and since in analogous cases the law regards the substance, and not the form of the transaction. 1 Hutchinson, Carriers, (3rd ed.) §§ 44, 83.

CHARITIES—CY PRES DOCTRINE.—A testator bequeathed his residuary estate to trustees for the establishment and maintenance in a certain town of a hospital to be named for the donor. The fund proved wholly insufficient for the purpose, and another hospital having subsequently been built in the town and the literal execution of the trust having thereby been made impracticable, it was decreed that the trustees should turn over the fund to the hospital already built, for the maintenance of a ward in the donor's memory. *Held,* this disposition was proper under the *cy pres* doctrine. *Adams* v. *Page* (N. H. 1911) 79 Atl. 838. See Notes, p. 773.

CONFLICT OF LAWS—STATUTES—EXTRATERRITORIAL EFFECT OF STATUTES RESTRICTING THE RIGHT OF MARRIAGE.—An action for the annulment of a marriage was brought under the New York statute declaring void from the date of the decree of a court of competent jurisdiction, the marriage of one under eighteen. (N. Y. Consol. Laws, Dom. Rel. Law § 7). The plaintiff, who was under eighteen and domiciled in New York, married in Washington the defendant, who was domiciled in Maryland. The marriage was valid by the laws of the District of Columbia and of Maryland, and the parties intended to reside in the latter State. *Held,* a demurrer to the action must be sustained. *Reid* v. *Reid* (N. Y. 1911) 72 Misc. 214. See Notes, p. 767.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—TERM OF IMPRISONMENT DEPENDENT ON MEDICAL EXAMINATION.—A statute provided that a woman convicted of vagrancy should be committed to a hospital for not over twelve months, or until cured, upon a physician's report that she was afflicted with a communicable venereal disease. (Laws of 1910, c. 659 § 79.) Otherwise the maximum sentence was fixed at six months. *Held,* two judges dissenting, the prisoner was not deprived of liberty without due process of law. *People ex rel. Barone* v. *Fox* (1911) 129 N. Y. Supp. 646.

It is well established that due process need not in all cases be judicial process. See *People* v. *Reetz* (1901) 127 Mich. 87; aff'd 188 U. S. 505. Thus administrative agencies may determine a convicted prisoner's sanity, *State* v. *Lyons* (1904) 113 La. 959; *Nobles* v. *Georgia* (1897) 168 U. S. 398, or questions involving the liberty of aliens, who are assumed to be entitled to due process. See *U. S. ex rel.* v. *Williams* (1904) 194 U. S. 279; *U. S.* v. *Ju Toy* (1905) 198 U. S. 263. While a ministerial officer may not be empowered finally to determine without a hearing a question of identity as decisive of the length of imprisonment, *Matter of Kenny* (N. Y. 1898) 23 Misc. 9; aff'd 36 App. Div. 624; *cf. People ex rel.* v. *Fox* (N. Y. 1902) 77 App. Div. 245, statutes intended to protect the public health are regarded more liberally. Accordingly, the legislature may provide for a person's removal to a pest house upon the final and summary determination of a health officer that he suffers from a dangerous contagious disease, *Haverty* v. *Bass* (1876) 66 Me. 71; see *Brown* v. *Purdy* (1856) 8 N. Y. St. Rep. 143, and in such cases the courts will review only the *bona fides* and reasonableness of the determination. *Beeks* v. *Dickinson County* (1906) 131 Ia. 244; *Valentine* v. *Englewood* (1908) 76 N. J. L. 509. However, the urgent necessity which alone vindicates such procedure is not discoverable in the present case to justify the summary means adopted by the statute. It can, therefore, be upheld

only by employing the strained interpretation of the prevailing opinion which construes it as permissive rather than mandatory.

CONSTITUTIONAL LAW—EQUAL PROTECTION OF THE LAW—GRANT OF POWER TO LICENSE.—The defendants were convicted under a statute providing that the commissioners of fisheries "may grant or refuse to grant licenses to catch" lobsters. *Held,* the statute was constitutional. *State* v. *Kofines* (R. I. 1911)) 80 Atl. 432.

To regulate certain businesses and acts, a State, under its police power, may require those engaging in them to obtain its license, the bestowal of which it may leave to an administrative agency. Powell, Admin. Exercise of Police Power, 24 Harv. L. Rev. 269. But since a grant to such a body of absolute and arbitrary power would be a legislative authorization of discrimination, violating the constitutional guaranty of equal protection of the laws, see *Yick Wo* v. *Hopkins* (1886) 118 U. S. 356, and since statutes should be constitutionally construed whenever possible, an act like that under consideration should be interpreted as conferring merely the power to exercise in the premises a discretion subject to judicial review if abused. *Cf. Liebermann* v. *Van De Carr* (1905) 199 U. S. 552. Even this power, however, is too broad when material rights or the ordinary and innocuous occupations are the subject of regulation. *Schaezlein* v. *Cabaniss* (1902) 135 Cal. 466; *Matter of Frazee* (1886) 63 Mich. 396. With reference to these the administrative body must act according to definite and uniform standards prescribed by the legislature, or frequently, as where expert knowledge is necessary for intelligent action, by itself, *Isenhour* v. *State* (1901) 157 Ind. 517, but, if essential to administrative efficiency, see *Wilson* v. *Eureka City* (1899) 173 U. S. 32; *Buttfield* v. *Stranaham* (1904) 192 U. S. 470, and if that which is regulated may be entirely prohibited, as an inherently vicious thing, *Crowley* v. *Christensen* (1890) 137 U. S. 86, or if it is a mere privilege like that involved in the principal case, *In re Flaherty* (1895) 105 Cal. 558; *Geer* v. *Connecticutt* (1895) 161 U. S. 519, the administrative agency may be empowered to grant or deny licenses in its discretion, having in view only the facts of each case, and only its *bona fides* may be judicially reviewed. *Cf. Commrs.* v. *Covey* (1891) 74 Md. 262. That such a power may be abused does not make the statute which confers it unconstitutional as a denial of equal protection. *State* v. *Briggs* (1904) 45 Ore. 366. The statute in the principal case therefore is open to no valid objection on constitutional grounds.

CONSTITUTIONAL LAW—POWER OF A STATE TO COMPEL WITNESSES TO TESTIFY IN ANOTHER JURISDICTION.—The plaintiff asked for subpoena requiring a non-resident then in New York, to appear and testify in a criminal action pending in Massachusetts. N. Y. Code Criminal Proc. § 618-*a* provides that such subpoena shall issue upon the request of any State bordering on New York and having a similar statute. *Held,* one judge dissenting, the statute was constitutional. *Comw.* v. *Klaus* (1911) 130 N. Y. Supp. 713.

That a sovereign's jurisdiction *in personam* is commonly conceived of as bounded by its territorial borders, is due to the lack of its power ordinarily to compel the extraterritorial performance of an act. Power and jurisdiction, however, are not synonymous and it is because of a lack of the former rather than of the latter that

courts of equity generally will not order an act to be done abroad. *R. R. Co.* v. *Hammond* (1877) 58 Ga. 523; 11 COLUMBIA LAW REVIEW 262. This conception of jurisdiction is apparently embodied in those cases where the sovereign has ordered the conveyance of land situated elsewhere, *Massie* v. *Watts* (1810) 6 Cranch 198, or the production of books from beyond its borders. *Consolidated Rendering Co.* v. *Vermont* (1908) 207 U. S. 541. It would therefore seem that since the statute in question authorizes merely the exercise of a jurisdiction recognized by the law of the land, it is not violative of due process. 2 Willoughby, Constitution, §§ 460, 461; 11 COLUMBIA LAW REVIEW 352. Nor does the statute abridge the privileges and immunities of the citizens of the several States, since this constitutional provision forbids only discrimination in the making or the enforcing of laws. *Slaughter House Cases* (1872) 16 Wall. 36, 74. A more serious objection to the enactment, however, appears in the constitutional prohibition of compacts made between the States without the consent of Congress. It has been held that any action in consequence of intercourse and arrangement with foreign countries constitutes an agreement within the meaning of this section, even though there be no binding civil contract. *People ex rel.* v. *Curtis* (1872) 50 N. Y. 321; *Holmes* v. *Jennison* (1840) 14 Pet. 540. Therefore, since the statute requires both reciprocal legislation and action in response to a request by another State, it would seem that a compact of the kind prohibited has been made.

CONTEMPTS—PERFORMANCE OF LAWFUL ACT AS CONTEMPT—SPITE FENCE.—The plaintiff sought the removal of a spite fence erected by the defendant to deter the former from persisting in a suit against the latter. *Held,* the erection of the fence while not tortious *per se,* was a contempt of court and it should be removed. *Wilson* v. *Irwin* (Ky. 1911) 138 S. W. 373.

In as much as motive was immaterial in the law of torts, and the presence of malice was not sufficient to render unlawful an otherwise lawful act, it was well settled at common law that the erection of a spite fence for whatever purpose gave the injured party no right of action. Burdick, Torts, 45; *Letts* v. *Kessler* (1898) 54 Oh. St. 73. In many States in this country, however, this rule has either been changed by legislation, or rejected by the courts, which seem to limit property rights by injecting into the law of torts a rule of moral conduct. *Barger* v. *Barrington* (1909) 151 N. C. 433; *Flaherty* v. *Moran* (1890) 81 Mich. 52. This departure from the common law rule may perhaps be accounted for by the fact that the doctrine of ancient lights, which in England furnished sufficient cause for the removal of such obstructions, never obtained in this country, so that the courts have been only too eager to enjoin them as a nuisance. *Rideout* v. *Knox* (1889) 148 Mass. 368. Although the construction of such a fence in those jurisdictions, under circumstances tending to obstruct the course of justice, might also be deemed a contempt, *Comw.* v. *Feely* (1815) 2 Va. Cas. 1; *Haskett* v. *State* (1875) 51 Ind. 176, it is beyond the power of a court to punish as such the exercise of an undoubted legal right. *People* v. *Hackley* (1861) 24 N. Y. 74; *Bourlier* v. *Macauley* (1891) 91 Ky. 135. It would therefore seem that the court in the principal case, having declared that the construction of a spite fence was not tortious *per se,* was not justified in punishing as a contempt its erection even under such peculiar circumstances.

CONTEMPTS—QUASI-JUDICIAL BODIES—POWER TO PUNISH FOR CONTEMPT.—A county board of tax equalization, authorized by statute to subpoena witnesses while hearing appeals from assessments, ordered the petitioner to testify and, upon his refusal, committed him for contempt. *Held,* one judge dissenting, the power to punish for contempt was impliedly conferred with the power to subpoena witnesses. *Ex parte Sanford* (Mo. 1911) 139 S. W. 376.

Where an administrative officer is vested with discretion in the discharge of his duties, his acts are regarded as quasi-judicial. *School District* v. *Lambert* (1895) 28 Ore. 209; *DeWeese* v. *Smith* (1899) 97 Fed. 309. Thus, a board of equalization exercises quasi-judicial functions in determining appeals from previous valuations. *Langenberg* v. *Decker* (1891) 131 Ind. 471. While courts of record have inherently a power to punish for contempt, *Cartwright's Case* (1873) 114 Mass. 230, which may be conferred upon inferior courts by statute, *Ex parte Robertson* (1889) 27 Tex. App. 628, this power may not, by the weight of authority, be granted to non-judicial agencies although they exercise quasi-judicial functions. *Whitcomb's Case* (1876) 120 Mass. 118; *Langenberg* v. *Decker supra.* Nor is the fact that grand juries and notaries public may punish their contemnors inconsistent with this view, since they are regarded as an integral part of the judicial system. See *Ex parte Krieger* (1879) 7 Mo. App. 367. The underlying reason in any case for denying the legislature's right to grant the power to punish for contempt is that such power is purely judicial, belonging exclusively to courts except where the constitution has conferred it upon the legislature, and it is not incident to the mere exercise of a judicial function. *Whitcomb's Case supra; Kilbourn* v. *Thompson* (1880) 103 U. S. 168; *In re McClean* (1888) 37 Fed. 648. It would seem, therefore, that the power to punish for contempt could not have been given expressly to the equalization board, but assuming the opposite to be true, it is nevertheless difficult to sustain the conclusion of the court that this power may be conferred by implication. *In re Mason* (1896) 43 Fed. 510; *Noyes* v. *Byxbee* (1877) 45 Conn. 382; *Ex parte Mallinkrodt* (1855) 20 Mo. 493.

CORPORATIONS—NON-COMPLIANCE OF FOREIGN CORPORATIONS WITH STATUTORY CONDITIONS—STATUS OF CONTRACTS MADE WHILE IN DEFAULT.—A foreign corporation having contracted with a citizen before complying with the requirements for doing business in the State, the plaintiff, in privity with the corporation, sought to have the contract set aside as void. *Held,* the contract was only voidable at the election of the citizen. *Central Coal and Coke Co.* v. *Optimo Lead and Zinc Co.* (Mo. 1911) 139 S. W. 525. See Notes, p. 779.

DEDICATION—GIFT BY PLAT TO RAILROAD—ACCEPTANCE.—In injunction proceedings the plaintiff company claimed a strip of land bordering its right of way by reason of a statutory dedication in a town plat. *Held,* the plaintiff was not entitled to relief as it did not prove an acceptance of the dedication. *Iowa Central Ry. Co.* v. *Homan* (Ia. 1911) 131 N. W. 878.

Statutory dedication extends the principles of common law dedication in that the latter confers but a right in the nature of an easement, *St. Mary* v. *Jacobs* (1871) L. R. 7 Q. B. 47; *Patrick* v. *Y. M. C. A.* (1899) 120 Mich. 185, 192, and vests that only in the public, *Elyton Land Co.* v. *South etc. R. R. Co.* (1891) 95 Ala. 631, while

the former may convey the legal title, *Des Moines* v. *Hall* (1868) 24 Ia. 234, even to a private corporation. *Morgan* v. *R. R. Co.* (1877) 96 U. S. 716; *Railroad* v. *Baker* (1904) 183 Mo. 312. For either form of dedication to be effective, there must be a clear intention to dedicate, 10 COLUMBIA LAW REVIEW 365, and an acceptance, unless excused by statute, by the donee. *Manderschid* v. *Dubuque* (1870) 29 Ia. 73; *Russell* v. *Ry. Co.* (1903) 205 Ill. 155, 165. The necessity of acceptance is often based upon the erroneous view that dedication is an application of the doctrine of estoppel. See *Wilder* v. *St. Paul* (1866) 12 Minn. 192, 200. While it is true that the dedicator may be estopped from denying the fact of dedication as against individuals whom he has induced to act upon belief of its existence, *Grogan* v. *Hayward* (1880) 4 Fed. 161; *Russell* v. *Ry. Co. supra,* dedication does not depend upon estoppel. Angell, Highways, (3rd ed.) § 156. It is also said that dedication is a grant, peculiar in that there need be no grantee *in esse,* and that, like grants by deed, it must be accepted to be effectual. *Cincinnati* v. *White* (1832) 6 Pet. 431. However, dedication seems in its essence a method *sui generis* of transferring interests in land, which is distinct from grants and in the development of which acceptance became an essential element for the practical reasons that otherwise burdens might be imposed upon unwilling donees and that some limit had to be placed upon the dedicator's right to revoke his gift. Angell, Highways, (3rd ed.) § 135; *Littler* v. *Lincoln* (1883) 106 Ill. 353. Whatever the true theory, however, it is clear that by failing to prove acceptance, the plaintiff in the principal case failed to establish its cause of action.

EASEMENTS—NATURE OF EASEMENTS IN GROSS—SPECIFIC PERFORMANCE.—The defendant attempted to revoke the exclusive right to maintain bill boards on his land which he had given to the plaintiff by contract, and made a similar agreement with another company. The plaintiff sought injunctive relief against both parties who had proceeded to tear down its bill boards. *Held,* since the right created was an easement in gross and not a mere contract right, the injunction should issue. *Borough Bill Board Co.* v. *Levy* (1911) 129 N. Y. Supp. 740.

The so-called easement in gross has never been recognized in England as a true easement, which is an interest in land, but it is deemed a mere contract right, not even assignable. *Rangeley* v. *Midland Ry. Co.* (1868) L. R. 3 Ch. 316; *Hill* v. *Tupper* (1863) 2 H. & C. 121; *Ackroyd* v. *Smith* (1850) 10 C. B. 164. The nature of the servitude in question has rarely been determined in the United States, for easements are construed as appurtenant to a dominant estate whenever possible. *Wagner* v. *Hanna* (1869) 38 Cal. 111. A liberal view has been taken in several States regarding the assignability of the right to take water, *Goodrich* v. *Burbank* (Mass. 1866) 12 Allen 459; *Poull* v. *Moukley* (1873) 33 Wis. 482; *Bank* v. *Miller* (1881) 6 Fed. 545; 7 COLUMBIA LAW REVIEW 537, but this is consistent with the conception of the easement in gross as a contract right. But see Washburn, Easements, 11. Although in a few instances greater rights have been attached to easements in gross than can be justified by principles of contract, *Willoughby* v. *Lawrence* (1886) 116 Ill. 11; *Standard Oil Co.* v. *Buchi* (1907) 72 N. J. Eq. 492, and although an early case even declared it inheritable, *White* v. *Crawford* (1813) 10 Mass. 189, the general view in this country is clearly that taken

in England. *Garrison* v. *Rudd* (1858) 19 Ill. 558; *Tenicum Fishing Co.* v. *Carter* (1869) 61 Pa. 21; *Boatman* v. *Lasley* (1873) 23 Oh. St. 614. It would seem, therefore, that to hold the right under consideration something more than a mere contract right, is to ignore the true character of an easement in gross. However, since a court of equity might have taken jurisdiction to enforce the contract because of the speculative character of the damages flowing from its breach, *Adderley* v. *Dixon* (1824) 1 Sim. & S. 607, and could then have protected it from any interference, the decree of the court in the principal case is not unjustifiable.

EASEMENTS—TERMINATION—ABANDONMENT AND ESTOPPEL.—The defendant, with the knowledge of the plaintiff, built upon land over which the latter had a right of way. *Held,* there was not sufficient evidence to constitute an abandonment of the easement. *Blenis* v. *Utica Knitting Co.* (1911) 130 N. Y. Supp. 740. See Notes, p. 777.

EQUITY—ADJUSTMENT OF THE AFFAIRS OF AN INSOLVENT BUILDING AND LOAN ASSOCIATION.—The plaintiff receiver brought a *scire facias* on a mortgage given by the defendant to secure payment of dues and interest on an advance to him of the par value of his shares in the insolvent association. *Held,* the defendant should be charged with legal interest on the amount advanced and credited with the premium and all payments of interest. *Trustees of Mutual Loan Ass'n* v. *Tyre* (Del. 1911) 81 Atl. 48. See Notes, p. 775.

EQUITY—JURISDICTION TO AWARD DAMAGES—BALANCE OF CONVENIENCE.—The plaintiff sought damages in addition to an injunction restraining the defendant from continuing a nuisance. *Held,* the court's jurisdiction to award damages failed upon its determination that public convenience precluded injunctive relief. *Union Planters' Bank & Trust Co.* v. *Memphis Hotel Co.* (Tenn. 1911) 139 S. W. 715.

While a court of equity has no jurisdiction over tort or contract actions brought solely for conpensatory damages, *Root* v. *Railway Co.* (1881) 105 U. S. 189, it may award such compensation as incidental to injunctive relief. *Richi* v. *Chattanooga Brewing Co.* (1900) 105 Tenn. 651. However, the power to give damages is not dependent on the issuance of the injunction, for if at the inception of the suit the plaintiff had valid grounds for invoking equity's aid, although they subsequently disappear, the court is not thereby ousted of jurisdiction and may grant money relief. *McCarthy* v. *Gaston Ridge Mill Co.* (1904) 144 Cal. 542; *Clark* v. *Wooster* (1888) 119 U. S. 323. But one cannot confer power on the court to give damages by asserting, in his pleadings, an equity which never existed. *Campbell* v. *Rust* (1899) 95 Va. 653. Although the theory of the early cases was that equity, having once acquired jurisdiction, gave relief as a matter of grace, it afterwards became established that upon proof of the existence of a nuisance, an injunction would issue as a matter of right. *Campbell* v. *Seaman* (1876) 63 N. Y. 568. While the later position has been relaxed in some States by the doctrine of "balance of convenience," this consideration would not seem to furnish a test of jurisdiction, and it is of importance only in determining the proper relief to be given. This principle finds illustration in analogous cases where damages are given, though an injunction is denied because of laches. *New York*

City v. *Pine* (1901) 185 U. S. 93. The contrary view, which is that advanced in the principal case and which is not without precedent, *Clifton Iron Co.* v. *Dye* (1888) 87 Ala. 468; *Fish* v. *Hartford* (1898) 70 Conn. 720, not only results from a confusion of rights and remedies, but operates harshly in that it creates a jurisdictional fact which will often be beyond the powers of the complainant to determine. See *Lane* v. *Mich. Traction Co.* (1903) 135 Mich. 70; *Fox* v. *Holcomb* (1875) 32 Mich. 494; *Roberts* v. *Dove* (1909) 116 N. Y. Supp. 468.

EVIDENCE—BURDEN OF PROOF—INSANITY OF TESTATOR.—Upon proof that the testator had been insane before and after making the will, the jury was instructed that the proponent must show by the preponderance of evidence that it was executed during a lucid interval. *Held,* the charge was erroneous. *In re Murphy's Estate* (Mont. 1911) 116 Pac. 1004.

Since the proponent of a will seeks to prevent the common law descent of property, *Williams* v. *Robinson* (1870) 42 Vt. 659, he has the burden of proving the competency required of the testator by statute. *Crowninshield* v. *Crowninshield* (Mass. 1854) 2 Gray 524. But see *In re Colbert's Estate* (1905) 31 Mont. 461. Nevertheless, after proof of the formal execution of the will, he is aided by a presumption of sanity which is generally recognized, *Gesell* v. *Baugher* (1905) 100 Md. 677; *Milton* v. *Hunter* (Ky. 1877) 13 Bush 163, but which, in a number of jurisdictions, may be raised only by additional evidence. *Williams* v. *Robinson supra;* and see 4 Wigmore, Evidence, § 2500. Its effect is to relieve the proponent of the duty of first offering proof of the testator's sanity, by creating a *prima facie case,* and to force the contestant to give evidence sufficient to raise a doubt in the minds of the jury. Thayer, Prelim. Treat. Evid., 381-384; *Perkins* v. *Perkins* (1859) 39 N. H. 163. As this presumption is, by the better view, but a rule of law which operates only on the burden of going forward with the evidence, leaving unaffected the *onus probandi,* Thayer, Prelim. Treat. Evid., *ubi supra,* the proponent at this point must affirmatively show his testator's capacity without assistance from the presumption, which has no evidentiary weight. *Henning* v. *Stephenson* (1904) 118 Ky. 318; *Entwhistle* v. *Meikle* (1899) 180 Ill. 9; *Chrisman* v. *Chrisman* (1888) 16 Ore. 137; *contra, Hopkins* v. *Grimes* (Ky. 1852) 13 B. Mon. 257. As general or habitual insanity is presumed to continue, *Duffield* v. *Morris* (Del. 1838) 2 Harr. 375, evidence of its existence before the execution of the will has been held to create a doubt sufficient to require proof of a lucid interval. *Grabill* v. *Barr* (1846) 5 Pa. 441. However, the court in the principal case properly held that intermittent insanity could not be said as a matter of law to have this effect. *Murphree* v. *Sinn* (1894) 107 Ala. 424.

HUSBAND AND WIFE—SEPARATION AGREEMENT—ACTION BY WIFE FOR SUPPORT OF MINOR CHILDREN.—A wife, having received the custody of minor children under a separation agreement, sought reimbursement for their support from her husband. *Held,* the wife was a volunteer and could not recover. *Smith* v. *Smith* (Ga. 1911) 71 S. E. 869.

Although in England a father's obligation to support minor children is only moral, 9 COLUMBIA LAW REVIEW 185, in America, generally, the duty is legal as well. *Alvey* v. *Hartwig* (1907) 106 Md. 254; *Brown* v. *Brown* (Ga. 1909) 64 S. E. 1093; but see *Finch* v.

Finch (1853) 22 Conn. 411. In both countries, however, the father alone was entitled to the corresponding rights of custody and services. *Comw.* v. *Briggs* (Mass. 1834) 16 Pick. 203; *Comw.* v. *Hart* (Pa. 1880) 14 Phila. 352. Even if he has waived these rights by voluntary separation, or has lost them as a result of divorce proceedings awarding custody to the wife, his duty continues, *De Manneville* v. *De Manneville* (1804) 10 Ves. Jr. 52; *People* v. *Chegary* (N. Y. 1836)) 18 Wend. 637, since he cannot plead his own wrong to avoid his liability. *Pretzinger* v. *Pretzinger* (1887) 45 Oh. St. 452. On the other hand, the duties and rights of the wife arose only on the death of the husband, *Gleason* v. *City of Boston* (1887) 144 Mass. 25; but see *contra, Harris* v. *Harris* (1869) 5 Kan. 46, and during his life she could compel him to provide for their future support. 7 COLUMBIA LAW REVIEW 429. It is equally clear that she should be allowed to recover in an action *quasi ex contractu* for the past support of the children, although they are not interested in the cause, and although the father has not refused to support them, unless she has acted voluntarily and without request. *Quin* v. *Hill* (N. Y. 1886) 4 Dem. 69; *Irvine* v. *Angus* (1899) 93 Fed. 629. Having determined that the wife in the principal case had so acted, the conclusion of the court is doubtless sound.

MASTER AND SERVANT—SIMPLE APPLIANCES—PROMISE TO REPAIR—ASSUMPTION OF RISK.—The plaintiff continued working with a defective ladder relying on the defendant's promise to repair it. *Held,* the plaintiff did not assume the risks of the ladder, though it was a simple appliance. *Barr* v. *Pen Carbon Manifold Co.* (N. J. 1911) 80 Atl. 930.

It has been denied that a master is under any duty with reference to appliances of a simple character. See *Vanderpool* v. *Partridge* (1907) 79 Neb. 165; *Lynn* v. *Sugar Ref. Co.* (1905) 128 Ia. 501. It would seem, however, that he must always exercise a care commensurate with the risks of the instrumentality furnished, 1 Labatt, Master and Servant, §§ 14, 16, and that its simplicity is important only to show that its dangers were so obvious that the servant must have assumed the risks therefrom *ab initio, Electric Co.* v. *Murphy* (1888) 115 Ind. 566, or that he was guilty of contributory negligence in continuing its use, though promised that it would be repaired. *Hannigan* v. *Smith* (N. Y. 1898) 28 App. Div. 176; *McCarthy* v. *Washburn* (N. Y. 1899) 42 App. Div. 252. There is nevertheless authority for the view that in the case of simple machinery, the general rule that the master's undertaking to mend defects suspends the doctrine of assumption of risks and shifts all responsibility to him, 1 Labatt, Master and Servant, § 424; *Clarke* v. *Holmes* (1862) 7 Hurl. & N. 937, is not applicable. *McGill* v. *Traction Co.* (1908) 79 Oh. St. 293; *Kistner* v. *Amer. Steel Foundries* (1908) 233 Ill. 35. This apparently results from a confusion of the doctrines of assumption of risk and contributory negligence. See 4 COLUMBIA LAW REVIEW 306. Although a promise to repair clearly does not affect the defence of contributory negligence, *Railway Co.* v. *Brentford* (1898) 79 Tex. 619, there appears no sound reason why its operation upon the doctrine of assumption of risk should depend upon the degree of intricacy of the instrumentality, *Brouseau* v. *Kellogg Co.* 1909) 158 Mich. 312, for the difference between simple and complicated implements is no longer important when the servant appreciates that they are dangerous to

further use. *Louisville Hotel Co.* v. *Kaltenbrun* (Ky. 1904) 80 S. W. 1163. The court in the principal case therefore properly ignored such a distinction.

MORTGAGES—DEED OF TRUST—TENDER AFTER DEFAULT.—The plaintiff defaulted in the payment of one of several notes to secure which he had delivered to the defendant a trust deed accompanied by a contract giving the latter the option to declare the entire debt due upon such default. Having advertised the land for sale, the defendant refused tender of the defaulted payment. *Held,* the plaintiff was not entitled to injunctive relief. *Lee* v. *Security Bank and Trust Co.* (Tenn. 1911) 139 S. W. 690.

A trust deed of land given to secure a debt is dealt with as a mortgage, the separate defeasance agreement being regarded as incorporated in the deed itself, *Union Co.* v. *Sprague* (1884) 14 R. I. 452; *Hoffman Co.* v. *Mackall* (1855) 5 Oh. St. 124; *Erskine* v. *Townsend* (1806) 2 Mass. 493; 2 Story, Eq. Jur., (13th ed.) § 1018, and effect is now everywhere given to a provision therein that the entire debt should mature on the default of any payment. *Houston* v. *Curran* (1902) 101 Ill. App. 203; *Lincoln* v. *Corbitt* (1903) 31 Tex. Civ. App. 352; *Campbell* v. *West* (1890) 86 Cal. 197. If the acceleration of maturity is not automatic on default, but depends upon the exercise of an option given to the creditor, the latter may evidence his choice, as in the principal case, by advertising the property for sale under the trust deed. *Fowler* v. *Woodward* (1880) 26 Minn. 347. It follows that in those jurisdictions where a mortgage gives but a lien, which may be extinguished by tender of the debt even after default, thereby defeating foreclosure proceedings, the debtor should be required to tender the amount of the entire obligation. Thomas, Mortgages, (2nd ed.) § 400; *Wittmeier* v. *Tidwell* (1906) 150 Ala. 253; 10 COLUMBIA LAW REVIEW 252. Nevertheless, tender of more than the amount defaulted has been declared unnecessary. *Whelan* v. *Reilly* (1876) 61 Mo. 565. In a strict common law jurisdiction, however, offer of payment will not have this effect, since upon default the conditional title conveyed by the mortgage is rendered absolute, and the mortgagor is left to his equity of redemption. *Maynard* v. *Hunt* (Mass. 1827) 5 Pick. 240; 1 Jones, Mortgages, (6th ed.) §§ 892, 893. Accordingly, as the principal case arose in a common law jurisdiction, see *Schilling* v. *Darmody* (1898) 102 Tenn. 439; 1 Jones, Mortgages, (6th ed.) 51, tender would have been ineffectual regardless of its amount.

NEGLIGENCE—RAILROAD CROSSINGS—GIVING OF STATUTORY WARNING AS DUE CARE.—The deceased was killed by the defendant's train at a crossing the dangers of which had been increased by the company's erection of buildings which obstructed the view. *Held,* the defendant was bound to observe only the statutory precautions unless it had created extraordinary dangers which rendered them an insufficient protection. *Kyle* v. *Lehigh Valley R. R. Co.* (N. J. 1911) 80 Atl. 934.

Although it has been held that a railroad company is bound to give only the warning prescribed by statute when crossing a public highway, *C. & A. R. R. Co.* v. *Robinson* (1883) 106 Ill. 142, this view has not only been repudiated in the same jurisdiction, *Chicago, etc. R. R. Co.* v. *Perkins* (1888) 125 Ill. 127, but has been uniformly denied. *Shaber* v. *St. Paul, etc. Ry. Co.* (1881) 28 Minn. 103; *Grank Trunk Ry. Co.* v.

Ives (1892) 144 U. S. 408. Although a carrier generally cannot be charged with negligence when it has given the statutory signals, it is not excused from taking other precautions when necessary, *Richardson* v. *N. Y. C. R. R. Co.* (1871) 45 N. Y. 846, for the legislature cannot arbitrarily determine in advance what shall in every case constitute the reasonable prudence which a railroad company must exercise. *Grand Trunk* v. *Ives supra.* The effect of such enactments is therefore only to impose liability for failure to give the statutory warning, *I. C. R. R. Co.* v. *Benton* (1873) 69 Ill. 174, and the carrier's common law duty remains unchanged. *Erie R. R. Co.* v. *Weinstein* (1909) 166 Fed. 271; *Linfield* v. *Old Colony R. R. Corp.* (Mass. 1852) 10 Cush. 562. It would accordingly seem that the conclusion reached in the principal case, in so far as it embodies this principle, is correct. The court goes further, however, and reiterates the rule of its jurisdiction, that the statutory warning is sufficient unless the railroad company itself has created the unusual peril. *Hires* v. *Atlantic City R. R. Co.* (1901) 66 N. J. L. 30; *Penn. R. R. Co.* v. *Matthews* (1873) 37 N. J. L. 531. It is difficult to support this view, and sound reason demands that unusual precaution be taken against unusual danger whatever its origin. *Chicago, etc. Ry. Co.* v. *Netolicky* (1895) 67 Fed. 165; *Thompson* v. *N. Y. C. R. R. Co.* (1888) 110 N. Y. 636.

NUISANCE—PUBLIC NUISANCE—CONSEQUENTIAL DAMAGE AS SPECIAL DAMAGE—WHEN VIOLATION OF ORDINANCE CREATES TORT LIABILITY.—An ordinance providing for special licenses for taxicab systems restricted the operation of the licenses to specified points. The defendant company not only violated the terms of the ordinance but also blocked the streets. The plaintiff, holding a general license, sought to have the nuisance abated, alleging loss of trade as a special damage. *Held,* the action was not maintainable. *Hefferon* v. *New York Taxicab Co.* (1911) 130 N. Y. Supp. 710.

The unauthorized obstruction of a public highway is clearly a public nuisance, Wood, Nuisances, 73, but it is elementary that it will not give rise to a private action in the absence of special damage to the plaintiff. Burdick, Torts, (2nd ed.) 408; *Porth* v. *Manhattan Ry. Co.* (N. Y. 1890) 26 J. & S. 366. It seems, however, that not only is very slight injury now a sufficient basis for a private action, *Hughes* v. *Heiser* (Pa. 1808) 1 Binn. 463, but that it is immaterial whether the loss be consequential or direct. *Pittsburgh* v. *Scott* (1845) 1 Pa. 309; *contra, Hubert* v. *Groves* (1794) 1 Esp. 148. Since the sole object of not allowing every member of the public to bring suit in such a case, is to prevent multiplicity of actions, 1 Coke, Institutes, 56-*a,* this relaxation of the old common law rule seems well founded in reason. However, the plaintiff in the principal case could not have been brought within the scope of this liberal view, for the nuisance bore no causal relation to his loss. And while it might be argued that the ordinance operated to create a duty, the breach of which would give rise to tort liability, *Evans* v. *Waite* (1892) 83 Wis. 286; *Osborne* v. *Van Dyke* (1901) 113 Ia. 557, which could properly furnish a basis for equity jurisdiction because of the continuing character of the tort and the resulting inadequacy of legal remedies, Pomeroy, Eq. Jur. (Stud. ed.) § 1338; see *Clowes* v. *Staffordshire Co.* (1872) L. R. 8 Ch. App. 125, 142, the duty clearly was owed only to those whom the legislative body intended to protect,

Pollock, Torts, (8th ed.) 28, and it is difficult to see how the plaintiff might have been included in that class.

PARENT AND CHILD—ADOPTION—STATUTE DENYING CHILDREN ADOPTED ABROAD THE RIGHT OF INHERITANCE.—As the Alabama statute of descents denies the right of inheritance to children adopted abroad, the plaintiffs, to support their claim to property of their foster father situated in Alabama, relied upon a contract alleged to have resulted from the adoption proceedings in Louisiana, in which the plaintiff promised, in pursuance of the statute, to invest them with the rights of legitimate children in his estate. *Held,* they could not recover. *Hood et al.* v. *McGehee et al.* (C. C. N. D. Ala. 1911) 189 Fed. 205.

Since an adopted child usually occupies, with reference to the property of the adoptive parent, the same position as a child born in lawful wedlock, *Virgin* v. *Marwick* (1903) 97 Me. 578; *Morrison* v. *Sessions* (1888) 70 Mich. 297, and since full effect is generally given extraterritorially to the status of adoption, *Ross* v. *Ross* (1880) 129 Mass. 243; *Van Matre* v. *Sankey* (1893) 148 Ill. 536, such a child ordinarily inherits the foster parent's property wherever situated. As the status created is not the source of the child's rights but is rather the sum of them, 2 Austin, Jurisp., 706, 974, it is clear that the ultimate purpose of an adoption is to confer such rights as the status comprehends. Accordingly, when the adoption proceedings are defective equity has specificially enforced the foster parent's agreement to confer upon the child the rights comprehended by the status of adoption. *Chehak* v. *Battles* (1907) 133 Ia. 107; *Healey* v. *Simpson* (1892) 113 Mo. 340; *contra, Albring* v. *Ward* (1904) 137 Mich. 352. In the principal case, however, the promise of the intestate was substantially that prescribed by the statute regulating adoption, and it was therefore not competent for the court to find in the adoption proceedings an intention to confer upon the plaintiff rights other than those which the statute gave to adopted children. As these rights which the plaintiff acquired upon the execution of the intestate's promise did not entitle them to the land in Alabama, their claim was properly held invalid.

PARTNERSHIP—BANKRUPTCY—DOUBLE PROOF OF QUASI-CONTRACTUAL CLAIM.—The plaintiff deposited securities with a partnership which wrongfully pledged them. Having proved his claim, sounding in quasi-contract, against the now bankrupt partnership, he sought to prove also against the individual estate of a bankrupt partner. *Held,* the claim could not be proved. *Reynolds* v. *New York Trust Co.* (C. C. A. 1st Ct. 1911) 188 Fed. 611.

While generally the tort may be waived, and suit brought in an action *quasi ex contractu,* when the converted property has been sold, many courts repudiate this principle when the tort-feasor has kept or consumed it. *Jones* v. *Hoar* (Mass. 1827) 5 Pick. 285; *Hutton* v. *Wetherald* (Del. 1848) 5 Harr. 38. Logically, as the principal case decided, if the defendant has been enriched, the form of the benefit is immaterial. *Braithwaite* v. *Akin* (1893) 3 N. D. 365. Where the tort is a partnership act, the liability of the partners is joint and several, Burdick, Liability of Partners, 11 COLUMBIA LAW REVIEW 101, and, upon waiver, their resulting quasi-contractual obligation would seem of the same character. Keener, Quasi-Contracts, 200. Although one of

several tort-feasors is liable on a contract arising *ex lege* only to the extent of his enrichment, Keener, Quasi-Contracts, *ubi supra,* he must answer for the full value of the property if his agent received it for him. *Nat. Trust Co.* v. *Gleason* (1879) 77 N Y. 400. Since each partner is the agent of all in partnership transactions and since, in the absence of statute, the firm is not an entity, Burdick, Partnership, 81 *et seq.,* the enrichment of the partnership is truly the enrichment of its members. Their quasi-contractual obligation being joint and several, it should be provable against their individual, as well as against partnership, assets. See *In re Coe* (1909) 169 Fed. 1002; *In re Coe* (1910) 183 Fed. 745; *cf. Matter of Blackford* (N. Y. 1898) 35 App. Div. 330; *In re Hirschman* (1900) 104 Fed. 69. The court in the principal case based the contrary view on the fact that after joint judgment in tort against the partners they cannot be sued severally. This seems of little importance, however, since execution may be issued against each of them, *Livingston* v. *Bishop* (N. Y. 1806) 1 Johns. 290, thus showing the real nature of their liability. *Matter of Blackford supra.*

PRESCRIPTION—WATER RIGHTS—RECIPROCAL EASEMENTS.—The defendant by means of a dam impounded the waters of a lake during the prescriptive period, thus creating upon the plaintiff's land a larger artificial lake, about which the latter made expensive improvements. The plaintiff sought to recover damages resulting from the defendant's draining said lake. *Held,* if the defendant maintained the lake adversely, the plaintiff acquired by the same act a reciprocal easement to have the artificial conditions continued. *Fin & Feather Club* v. *Thomas* (Tex. 1911) 138 S. W. 150. See Notes, p. 770.

TAXATION—TRANSFER TAX—PERSONAL PROPERTY OF WIFE.—The State attempted to tax the personal estate of a wife who died intestate, leaving a husband but no descendants, under an act taxing property transferred by will or under the interstate laws. *Held,* the property was exempt from taxation. *Matter of Green* (N. Y. 1911) 114 App. Div. 232.

At common law marriage operated as an absolute gift to the husband of all personal property in the wife's possession at any time during coverture, Co. Litt., (Hargrave's 13th ed.) 351-*b,* but since a chose in action was not assignable, Bracton, f. 58-*b,* it could not vest in the husband by marriage, *Richards* v. *Richards* (1831) 2 B. & Ad. 447; *Hayward* v. *Hayward* (Mass. 1838) 20 Pick. 517, so that it would seem that he received merely a right in the nature of a power of attorney to reduce it to possession during coverture. This right would be destroyed by the wife's death, and the property would pass to her administrator under the intestate laws, but the husband had, by the rules of descent and distribution, an absolute right to be appointed to that position, and might administer the property for his own benefit, subject only to his wife's debts. *Sir George Sand's Case* 3 Salk, 21; *Andrew Ognel's Case* (1587) 4 Co. Rep. 48. In New York, however, the common law rule has given way to the anomalous view that title to a wife's choses in action, as well as to her choses in possession, vests in the husband upon marriage. *Vallance* v. *Bausch* (N. Y. 1859) 28 Barb. 633; *Ryder* v. *Hulse* (1862) 24 N. Y. 372. Although this doctrine may be explained by the fact that choses in action are now assignable, this consideration has not been deemed in most jurisdictions a sufficient reason for changing the nature of the

rights given the husband by the early common law. *Smart* v. *Trantner* (1888) L. R. 40 Ch. Div. 165. Moreover, the New York Married Womens' Acts of 1848 and 1849, while granting a *feme covert* the sole and exclusive power of disposal of the property during coverture, left the husband's rights acquired therein by virtue of the marriage otherwise unaffected. *Vallance* v. *Bausch supra; Ryder* v. *Hulse supra.* It is therefore clear that the court in the principal case, applying the peculiar law of its jurisdiction, properly held the property not taxable.

TORTS—STATE CHARITABLE CORPORATIONS—IMMUNITY FROM SUIT.—The defendant, a State college incorporated with the right to sue and be sued, and owning property other than that given to it by the State, erected a dam on public land, thereby injuring the plaintiff's property. The plaintiff sought damages and an injunction. *Held,* damages only would be given. *Hopkins* v. *Clemson College* (1911) 31 Sup. Ct. Rep. 654.

A college is a charitable corporation, *Dartmouth College* v. *Woodward* (1819) 4 Wheat. 518, 613; *Dexter* v. *Harvard College* (1900) 176 Mass. 192, and as such is not liable for the torts of its properly selected servants. *Thornton* v. *Franklin Square House* (1900) 200 Mass. 465; *Hearns* v. *Waterbury Hospital* (1895) 66 Conn. 98. Since the true reason for this rule is the inapplicability of the doctrine of *respondeat superior* to such organizations, 7 COLUMBIA LAW REVIEW 353, it should not be extended to corporate torts. *Hewett* v. *Association* (1906) 73 N. H. 556; *Davis* v. *Congregational Society* (1880) 129 Mass. 367. It has been held, however, that in no case are the torts of a State institution, incorporated to perform a governmental function, actionable, *Ala. Indus. School* v. *Reynolds* (1904) 143 Ala. 579; *Overholser* v. *Nat'l Home* (1903) 68 Oh. St. 236, but this apparently results from a failure to distinguish between the non-suability of the sovereign and the non-liability of public agents for the consequences of an authorized act. While such an organization in a given case might escape liability by invoking the latter defense, *Corbett* v. *St. Vincent's School* (1903) 177 N. Y. 16; see also *Valparaiso* v. *Hagen* (1899) 153 Ind. 337, as in the analogous cases of public officers and municipal corporations, *U. S.* v. *Lee* (1882) 106 U. S. 196, it is difficult to see how it can plead to the jurisdiction of the court the State's exemption from suit, *Herr* v. *Central Asylum* (1897) 97 Ky. 458; *Bain* v. *State* (1882) 86 N. C. 49, since it is a distinct legal entity which has not been expressly clothed with this immunity. That a judgment may not be executed against the property of a State seems an equally immaterial consideration if the corporation owns any property, regardless of its source. It is therefore submitted that damages might have been given in the principal case, had all of the defendant's property been received from the State, although it is clear that the injunction could not have been granted since it would have affected land owned by the State. *Cunningham* v. *Macon, etc., R. R.* (1883) 109 U. S. 446.

TRADE-MARKS—GEOGRAPHICAL NAMES—ABANDONMENT.—After producing a liquor widely marketed as *"Chartreuse"* the monks of *La Grande Chartreuse* moved to Spain and continued its production and sale under a slightly altered name. The defendant then adopted the old name and the plaintiff sought injunctive relief. *Held,* the word *"Chartreuse"* was a valid trade-mark and had not been abandoned. *Baglin* v. *Cusenier Co.* (1911) 31 Sup. Ct. Rep. 669.

It is a well settled rule of law that a geographical term is not susceptible of exclusive use as a trade-mark, *Elgin Watch Co.* v. *Ill. Watch Co.* (1901) 179 U. S. 665, even though the locality became known largely through the advertisement of the product bearing the same name. *Castner* v. *Coffman* (1899) 178 U. S. 168. However, this rule should not be extended to a case where the development of a business causes the growth of a surrounding community which assumes the same name, for this extension of the rule would anomalously cause the destruction of property rights as a result of the success of the business which first gave them value. But see *Glendon Iron Co.* v. *Uhler* (1874) 75 Pa. 467. Nor should the removal to a new locality be considered the surrender of such a trade-mark, in the absence of an intention to abandon, unless its continued use would tend to deceive the public, for intention is the controlling element in such cases. *Sachslehner* v. *Eisner Co.* (1900) 179 U. S. 19; *Wotherspoon* v. *Currier* (1872) 5 E. & I. App. 508; *Siegert* v. *Gandoli* (1907) 149 Fed. 100; but see *Manhattan Co.* v. *Wood* (1882) 108 U. S. 218. However, temporary non-user is not conclusive evidence of the intent to abandon, *Julian* v. *Hoosier Co.* (1881) 75 Ind. 408, and the insertion of new words is merely an amendment and not an abandonment. *Perkins* v. *Heert & Ehler* (N. Y. 1895) 5 App. Div. 335; *Dadirrian & Sons* v. *Hauenstein* (N. Y. 1902) 37 Misc. 23. The complainant in the principal case was therefore clearly entitled to the relief granted.

TRUSTS—SPENDTHRIFT TRUSTS—VALIDITY.—A testator devised property to trustees with directions to pay over to his son and his daughter-in-law one-half of the net income thereof, "in such proportions as they may see fit, paying more or less to the one or the other, as they may deem best" during the lifetime of the son. *Held,* a valid spendthrift trust was created. *Wallace* v. *Foxwell* (Ill. 1911) 95 N. E. 985. See Notes, p. 765.

VENDOR AND PURCHASER—PURCHASER AT EXECUTION SALE—POSSESSION BY TENANT IN COMMON.—A suit was brought by a tenant in common, who was in sole poesession of the premises and who had an equity in the interest of his co-tenant, for removal of cloud on title, against a purchaser of his co-tenant's estate at an execution sale. *Held,* since the defendant was a purchaser without notice, he took free from all equities. *Tyler* v. *Johnson* (Fla. 1911) 55 So. 870.

At common law a *bona fide* purchaser at an execution sale took subject to all equities in the property and defects in the title existing at the time the lien of judgment attached. *Farrant* v. *Thompson* (1822) 5 B. & Ald. 826; *Holland* v. *State* (1876) 15 Fla. 519. Although a few jurisdictions still adhere to this rule, rigidly applying the doctrine of *caveat emptor, Gray* v. *Denson* (1900) 129 Ala. 406; *Allen* v. *McGaughey* (1876) 31 Ark. 252; *Hicks* v. *Skinner* (1874) 71 N. C. 539, it is clearly contrary to the general spirit of the recording acts which encourage transfers of land by protecting purchasers in good faith from unrecorded incumbrances. It seems a sounder view, therefore, since the passage of these acts, to hold that a *bona fide* purchaser of land at an execution sale stands in the same position as any other purchaser in good faith, and the principal case in so deciding is in accord with the weight of authority. *Rooker* v. *Rooker* (1881) 75 Ind. 571; *Atkinson* v. *Beall* (1862) 33 Ga. 153; 2 Pomeroy, Eq. Jur., (3rd ed.) § 774. Under the intent of the recording acts,

open, notorious and exclusive possession of land by a person other than the vendor should be sufficient to put a purchaser upon inquiry as to the rights of the possessor, only when such possession is adverse to the record title. *Fair* v. *Stevenot* (1886) 29 Cal. 486; *Smith* v. *Owens* (W. Va. 1907) 59 S. E. 762. Otherwise, the purchaser should be relieved from the duty of inquiry. *Plumer* v. *Robertson* (Pa. 1820) 6 S. & R. 179; *Smith* v. *Yule* (1866) 31 Cal. 180. Since exclusive possession by one tenant in common is not inconsistent with his record title, by the better view it does not operate as constructive notice of an equity in the share of his co-tenant, *Schumacher* v. *Truman* (1901) 134 Cal. 430; *Martin* v. *Thomas* (1904) 56 W. Va. 220; *contra, Farmers' Bank* v. *Sperling* (1885) 113 Ill. 373, a doctrine which was correctly applied in the principal case.

WILLS—CONSTRUCTION—RULE IN WILD'S CASE.—Real property was devised to "S. M. and his children." *Held,* S. M. and his children living at the death of the testator took to the exclusion of those subsequently born. *Coogler et al.* v. *Crosby et al.* (S. C. 1911) 72 S. E. 149.

In determining the legal effect of a limitation to a person "and his children," the existence of issue at the time of making the will becomes a material consideration, for in the absence of such issue the gift will be construed as an estate tail instead of the joint tenancy of parent and children which would otherwise result. *Clifford* v. *Koe* (1880) L. R. 5 A. C. 447; *Parkman* v. *Bowdoin* (1833) 1 Sumn. Cir. Ct. Rep. 359; see *Wild's Case* (1599) 6 Co. Rep. 17. This rule, however, unlike the Rule in *Shelley's Case,* is a rule of construction rather than a rule of property, *Buffer* v. *Bradford* (1741) 2 Atk. 220, and its reason is that the only limitation consistent with an intent to make an immediate gift in which the children shall share, is that of a fee tail. 2 Jarman, Wills, (6th Eng. ed.) 1906. It is clear, furthermore, that most modern statutes of entails will either destroy, N. Y. Consol. L., c. 50 § 32, or materially abridge the interest of the children, *Nightingale* v. *Burrell* (Mass. 1833) 15 Pick. 104, thus making the application of the Rule in *Wild's Case supra,* nugatory. This consideration should, nevertheless, have no bearing upon the construction of the devise, for the statute acts in defeasance of intention, and its operation is predicated upon the assumption that the ordinary canons of construction will be observed. Kales, Future Interests, § 206. Hence, there being no issue at the time of making the will, the parent should take a fee simple, *Wiley Co.* v. *Smith* (1847) 3 Ga. 351; see *contra, Turner* v. *Ivie* (Tenn. 1871) 5 Heisk. 222, 235, or a fee simple with a remainder over: Ill. R. S. (1874) c. 30 § 6. It would therefore seem that the court in the principal case should have made the existence of children when the will was executed the object of inquiry, and in the absence of issue at that time, the limitation should have been construed to give S. M. a fee conditional, as the Statute *De Donis* has never been adopted in South Carolina. *Withers* v. *Jenkins* (1880) 14 S. C. 597; see *Rembert* v. *Evans* (1910) 86 S. C. 445.

WITNESSES—MARITAL PRIVILEGE—EXCEPTION.—During the trial of a husband for persuading his wife to go, and causing her to be carried, from one State to another in violation of an Act (36 Stat. at L. 825) prohibiting white slave traffic, the prosecution called the wife as a witness. *Held,* the defendant could not plead his marital privilege. *U. S.* v. *Rispoli* (1911) 189 Fed. 271.

Even under the early common law the privilege of one spouse to insist upon the exclusion of adverse testimony by the other, was not of universal application. *Lord Audley's Case* (1632) 1 Hutton 115. To-day it is loosely said that the marital privilege may not be claimed in a prosecution of the husband or the wife for any crime against, or personal injury to, the other. See *People* v. *Quanstrom* (1892) 93 Mich. 254. An examination of the cases, however, shows that, in the absence of statute, the privilege may generally be invoked unless physical violence, actual or threatened, is an essential element of the offence alleged. *State* v. *Dyer* (1871) 59 Me. 303; *Clarke* v. *State* (1897) 117 Ala. 1. Thus, a wife is permitted to testify when the husband is charged with an assault on her, *Soule's Case* (Me. 1828) 5 Greenl. 407; *People v. Sebring* (1887) 66 Mich. 705, or with procuring an abortion by force, *State* v. *Dyer supra,* but not when he is indicted for the theft of her property, *Overton* v. *State* (1875) 43 Tex. 616, for adultery, *Mills* v. *U. S.* (Wis. 1839) 1 Pin. 73; *Crawford* v. *State* (1898) 98 Wis. 623, or for an abortion procured by drugs. *Miller* v. *State* (1897) 37 Tex. Cr. 575. The most rational explanation for thus restricting the exception to crimes of violence is that their commission is usually attended by such secrecy that they alone necessitate any abridgement of the marital privilege. *State* v. *Woodrow* (1905) 58 W. Va. 527; *Soule's Case supra.* However, since the reason most often advanced for the privilege, that it tends to preserve domestic peace, is of doubtful validity in any case, 4 Wigmore, Evidence, § 2228; see *Munyon* v. *State* (1898) 62 N. J. L. 1, and ceases to exist altogether whenever any crime is committed by one spouse against the other, the result reached in the principal case may easily be justified, though it is opposed to the weight of authority.